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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/762,074

01/20/2004

Darren Traub

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34313 7590 08/24/2007  
ORRICK, HERRINGTON & SUTCLIFFE, LLP  
IP PROSECUTION DEPARTMENT  
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IRVINE, CA 92614-2558

EXAMINER
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GILBERT, WILLIAM V

ART UNIT	PAPER NUMBER
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3635

MAIL DATE	DELIVERY MODE
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08/24/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>		<b>Applicant(s)</b>	
	10/762,074		TRAUB ET AL.	
	<b>Examiner</b>		<b>Art Unit</b>	
	William V. Gilbert		3635	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 14 June 2007.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-4,6-20 and 32-42 is/are pending in the application.
- 4a) Of the above claim(s) 3-5,10,15-31,33-35,37,40 and 42 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2,6-9,11-14,32,36,38,39 and 41 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 14 June 2007 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

Art Unit: 3635

### DETAILED ACTION

This is a Final Office Action. Claims 3, 4, 10, 15-20, 33-35, 37, 40 and 42 have been withdrawn from consideration. Claims 5 and 21-31 have been cancelled. Claims 1, 2, 6-9, 11-14, 32, 36, 38, 39 and 41 are examined below.

### *Claim Rejections - 35 USC § 103*

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Art Unit: 3635

Claims 1, 2, 6-9, 11-14, 32, 36, 38, 39 and 41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Chiodo (U.S. Patent No. 5,575,130) in view of Harding (U.S. Patent No. 5,256,006).

Claim 1: Chiodo discloses a stake member (Fig. 3) comprising a tapered lower region (proximate 42), an upper region (26) having a first channel (formed by 24, 60 and 70), and an intermediate region (between 42 and 26) between the upper and lower regions, the upper region having two vertical tabs (24, 70) extending vertically from the intermediate region in a direction opposite of the lower region and forming opposing walls of the first channel. Chiodo does not disclose a hammer cap in combination with the stake. Harding discloses a hammer cap (Fig. 8) for use with a stake having a striking surface (17) and vertical legs (23) forming opposite walls of a second channel, the hammer cap is couplable with the stake member and the first and second channels form an edging board channel having four walls that extend about the board. Note that the edging board is not actually claimed in combination with the stake and hammer cap, so it is not given patentable weight. It would have been obvious at the time the invention was made to a person having ordinary skill in the

Art Unit: 3635

art to use the hammer cap with the stake because hammer caps are well known in the art to help prevent damage to the structure being hammered. Further the prior art of record does not disclose the edging board channel being greater in height than the landscape board (see note above about the claiming of the edging board.) It would have been obvious at the time the invention was made to a person having ordinary skill in the art as a matter of design choice to have this limitation because the prior art is capable of meeting this limitation and one of ordinary skill in the art could make the edging board channel virtually any dimension. The edging board channel would have to be greater than the board because if the channel were not higher than the board, the hammer cap and stake could not be coupled.

Claim 2: the intermediate region has a supporting rib (the leg portion between 42 and 46).

Claim 6: the vertical tabs have horizontal grooves (62).

Claim 7: the grooves are dimensioned to receive the head of a fastener.

Claim 8: the tabs have apertures (30) dimensioned to receive the body of a fastener.

Art Unit: 3635

Claim 9: the intermediate region is tapered (portion between 42 and 46).

Claim 11: the vertical walls of the hammer cap can be coupled to the vertical tabs of the upper region of the stake. The prior art of record does not disclose the edging board channel being greater in height than the landscape board (see note above about the claiming of the edging board.) It would have been obvious at the time the invention was made to a person having ordinary skill in the art as a matter of design choice to have this limitation because the prior art is capable of meeting this limitation and one of ordinary skill in the art could make the edging board channel virtually any dimension. The result would be a gap between the board and the first region of the hammer cap.

Claim 12: looking to Chiodo, Figure 2 for reference, the width of the first region (17) is greater than the width (18) of an upper portion of the second region defining a finger guard as best understood by the Examiner.

Claim 13: the intermediate region (above 42) and the lower region (42) form a continuous taper.

Claim 14: the phrase "configured to receive the upper region of the stake member" line 2 is a statement of

Art Unit: 3635

intended use of the claimed invention and must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

Claim 32: Chiodo discloses a stake having a first recess (Fig. 3: 24, 60 and 70). Chiodo does not disclose a hammer cap. Harding discloses a cap having a second recess (formed by legs 23 and 24); the hammer cap is couplable with the stake member and the first and second channels form a channel having four walls that extend about the board. Note that the edging board is not actually claimed in combination with the stake and hammer cap and so is not given patentable weight. It would have been obvious at the time the invention was made to a person having ordinary skill in the art to use the hammer cap with the stake because hammer caps are well known in the art to help prevent damage to the structure being hammered. Further the prior art of record does not disclose the edging board channel being greater in height than the landscape board (see note above about the claiming of the edging board.) It would have been obvious at the time the invention was

Art Unit: 3635

made to a person having ordinary skill in the art as a matter of design choice to have this limitation because the prior art is capable of meeting this limitation and one of ordinary skill in the art could make the edging board channel virtually any dimension.

Claim 36: Chiodo discloses a stake comprising a lower region (42), an intermediate region (above 42) and an upper region (70), the upper region having two vertical tabs (24, 70) that are dimensioned to receive a board (see note above). Chiodo does not disclose a hammer cap. Harding discloses a cap having a second channel (formed by legs 23 and 24); the hammer cap is couplable with the stake member and the first and second channels form a channel having four walls that extend about the board. It would have been obvious at the time the invention was made to a person having ordinary skill in the art to use the hammer cap with the stake because hammer caps are well known in the art to help prevent damage to the structure being hammered.

Claim 38: the tabs comprise grooves (62); each groove is dimensioned to receive the head of a fastener.

Claim 39: the grooves (62) define an aperture that is dimensioned to receive a fastener.



Art Unit: 3635

Claim 41: the intermediate region (above 42) and the lower region (42) form a continuous taper.

***Response to Arguments***

2. The following addresses Applicant's remarks dated 14 June 2007.

Applicant's arguments, see page 6, filed 14 June 2007, with respect to the drawing objections have been fully considered and are persuasive. The objection of the drawings has been withdrawn.

Applicant's arguments with respect to the claims have been considered but are moot in view of the new ground(s) of rejection as claims are amended by the Applicant.

While the Examiner concedes that the Chiodo reference does not teach a hammer cap system, hammer caps are well known in the art for driving members into the ground in order to prevent damage to the structure being hammered into the ground. Applicant should note that the edging board is never actually claimed and the prior art of record, therefore, is capable of meeting the limitations structurally and the prior art of record for the hammer cap

Art Unit: 3635

(Harding) is capable of meeting the limitations (see rejection of Claim 1 above for explanation).

**Conclusion**

3. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL.** See MPEP § 706.07(a).

Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Art Unit: 3635

Any inquiry concerning this communication or earlier communications from the examiner should be directed to William V. Gilbert whose telephone number is 571.272.9055. The examiner can normally be reached on Monday - Friday, 08:00 to 17:00 EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Richard Chilcot can be reached on 571.272.6777. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 3635

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

WVG  
16 Aug 07  
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